

STATE OF WISCONSIN
DEPARTMENT OF INDUSTRY, LABOR AND HUMAN RELATIONS

In the Matter of the PECFA
Insurance Approval relating to:

Keil Environmental Engineering,
represented by:

James H. Yeager
Mortenson, Matzelle & Meldrum, Inc.
2009 West Beltline Highway
P.O. Box 9448
Madison, WI 53715-9448,

Petitioner.

FINAL DECISION

This is an appeal of a decision of the DILHR Division of Safety and Buildings which denied approval of the insurance policy procured for Keil Environmental Engineering under §ILHR 47.40(3)(c), Wis. Adm. Code, on the ground that the policy from the Commercial Casualty Insurance Co. did not comply with the rule's requirement that the "insurance coverage must be provided by a firm that has an A. M. Best rating of at least "A-."" Upon reviewing the facts and the arguments of the parties, I agree that the insurance policy does not comply with the rule.

The petitioner's appeal letter was received on May 12, 1993. A telephone hearing was conducted on May 20 and 21, 1993. The appearances were: James Yeager and Robert Tieman on behalf of the petitioner, and William Morrissey on behalf of the DILHR Division of Safety and Buildings.

FINDINGS OF FACT

1. Section ILHR 47.40(3)(c), Wis. Adm. Code, provides in part:

"Insurance. 1. By June 1, 1993, all consulting firms shall obtain and maintain errors and omission coverage, including pollution impairment liability, of no less than \$1,000,000 per claim, \$1,000,000 annual aggregate and with a deductible of no more than \$100,000 per claim.

2. A certificate or certificates verifying the existence of the required insurance coverage for all environmental consultants who performed work included in a claim, shall be submitted with the PECFA claim.

3. The insurance coverage must be provided by a firm that has an A. M. Best rating of at least "A-".

2. §ILHR 47.40(3)(c), Wis. Adm. Code, became effective on January 1, 1993, as a part of the emergency rule adopted by DILHR in December 1992.
3. Keil Environmental Engineering is an engineering and consulting firm that intends to qualify as a consulting firm under the PECFA rules, ch. ILHR 47, Wis. Adm. Code. The petitioner has acted as Keil's agent in obtaining the insurance coverage required by the rule.
4. Effective February 1, 1993, the petitioner obtained insurance coverage from the Commercial Casualty Insurance Co. of Norcross, Georgia. This company does not have an A. M. Best rating of "A-" or better.
5. The policy from Commercial Casualty originally included a reinsurance assumption endorsement (also referred to by the petitioner as a "cut-through endorsement") from the Underwriters Reinsurance Company of California, which, has an A. M. Best rating of "A-" or better. The endorsement provided that, upon a judicial determination of Commercial Casualty's insolvency and its failure to pay claims, the reinsurance company would pay directly to the named insured any amount claimed under its policy with Commercial Casualty that would otherwise be payable under the reinsurance agreement to Commercial Casualty. The endorsement specifically provides for a direct payment so that the rating of the reinsurance company may be used to satisfy an insurance rating requirement.¹
6. Effective April 1, 1993, Commercial Casualty changed its reinsurance from Underwriters

¹ The petitioner stated that the endorsement has been accepted for this purpose by other authorities.

Reinsurance to a "quota share reinsurance treaty" involving Reinsurance Corp. of New York (35%), Chartwell Reinsurance Co. (35%), CNA International Reinsurance Co. (20%), and Lloyd's of London (10%). The first three companies have A. M. Best ratings of "A-" or better. Lloyd's of London does not have an A. M. Best rating because of its unique business structure.² The petitioner first received notice of this change by mail on May 17, 1993.

7. The Division of Safety and Buildings denied approval because Commercial Casualty Insurance Co. does not have a rating of "A-" or better. The Division states that, while reinsurance may provide a level of safety over a non-rated or "B" rated company, it is not the same as insurance directly from a company with an "A-" rating. The Division intends to verify the insurance coverage of consulting firms at the time of PECFA claim review, and anticipates that this would become a more complex and time-consuming process if it accepts reinsurance coverage under the rule.

CONCLUSIONS OF LAW

1. The policy obtained by the petitioner from Commercial Casualty Insurance Co. does not comply with the terms of §ILHR 47.40(3)(c)3, Wis. Adm. Code.
2. The Division of Safety and Buildings has articulated a rational basis for following the "plain meaning" of §ILHR 47.40(3)(c)3, Wis. Adm. Code.
3. The Division was correct in denying approval to the insurance policy.

OPINION

In denying approval to the insurance policy obtained from Commercial Casualty, the Division of Safety and Buildings has done nothing more than apply its rule exactly according to its terms. To be acceptable under the rule, the policy must be from a company with an A. M. Best rating of "A-" or better; Commercial Casualty does not meet this requirement.

² The petitioner stated that Lloyd's of London, due to its unique structure and vast resources, is at least as secure as any company rated by A. M. Best. I have treated all four members of the reinsurance group as having a rating of "A-" or better under §ILHR 47.40(3)(c), Wis. Adm. Code.

The arguments presented by the petitioner as to the acceptability of its reinsurance arrangement amount to an argument that the Division should change its policy. However, policy is set by the Legislature in the statutes and by the Department in rulemaking proceedings. The purpose of this proceeding is not to review the desirability of a particular policy, but simply to determine whether the law and rules have been followed. In this case, the rule is being followed, and the Division has articulated a rational basis for following the rule.

ORDER

The decision of the Division of Safety and Buildings which denies approval under §ILHR 47.40(3)(c), Wis. Adm. Code, to the insurance policy obtained by the petitioner from Commercial Casualty Insurance Co., is hereby affirmed.

Dated at Madison, Wisconsin this 24th day of May, 1993.

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and Human Relations
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